UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

SIZE APPEAL OF:	)	
Tikigaq Engineering Services, LLC	)	Docket No. SIZ-2006-12-12-74
Appellant	)	
Request for Proposal No. SP0600-05-R-0024 U.S. Department of the Army Defense Logistics Agency Defense Energy Support Center Fort Belvoir, VA	)	Decided: March 15, 2007

APPEARANCES

Robert K. Tompkins, Esq., Walter T. Featherly, Esq., and Michael Carrato, Esq., Patton Boggs, LLP, Washington, D.C. and Anchorage, Alaska, for Appellant.

Laura Mann Eyester, Esq., Office of the General Counsel, U.S. Small Business Administration.

DECISION

PENDER, Administrative Judge:

Introduction and Jurisdiction

This appeal stems from Request for Proposal No. SP0600-05-R-0024 (RFP) issued by the Defense Energy Support Center (DESC) for privatization of electric power, power generation, natural gas, water, and wastewater distribution systems at major U.S. Army facilities in Alaska. After its initial approval of a joint venture between Tikigaq Engineering Services, LLC (Appellant), a current 8(a) Business Development program participant, and Weston Solutions, Inc. (WS) to perform the work of the RFP, the Alaska District Office (DO), of the Small Business Administration (SBA) reassessed its approval. Thereafter, the DO referred the matter to the Office of Government Contracting, Area Office VI (the Area Office) to review the small business size status of Appellant and the joint venture (ANC Utility Solutions, LLC or ANC) to determine its eligibility.

On November 22, 2006, the Area Office issued Size Determination No. 06-2007-008 (the size determination), finding Appellant and the joint venture to be other than small under North American Industry Classification System (NAICS) codes 221112 and 221122. Appellant received the size determination on November 27, 2006 and filed its appeal on December 12, 2006.

The U.S. Small Business Administration Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

Issue

Whether the Area Office made a clear error of fact or law by applying the "primarily engaged" size requirement in 13 C.F.R. § 121.201, Footnote 1, to the instant procurement.

Facts

1. DESC issued the RFP on March 31, 2005. DESC described the acquisition as being for the privatization of utility systems at major U.S. Army facilities in Alaska. DESC explained that the Army wanted to divest and transfer its utility systems to a non-Governmental entity. Section B of the RFP provided that offerors would submit offers for: (1) electrical, natural gas, and water distribution systems; (2) wastewater collection systems; and (3) central heat, power plant, and heat distribution systems at various locations.

2. The RFP contains Contract Line Items (CLINs) for various kinds of utility requirements at the various Army installations. Offerors were not required to submit proposals for all of the work that could be performed under the RFP.

3. On the cover sheet for the procurement, the DESC Contracting Officer (CO) checked the box indicating the procurement was restricted to firms eligible under Section 8(a) of the Small Business Act. DESC also included FAR 52.219-18, Notification of Competition Limited to Eligible 8(a) Concerns (June 2003), on page 46 of the RFP. Offers were due August 29, 2005.

4. In Section K of the RFP, DESC included FAR 52.219-1, Small Business Program Representations (APR 2002). The text relevant to this appeal states:

> (a)(1) The North American Industry Classification System (NAICS) code for this acquisition is 221122 electric, 221112 fossil fuel power generation, 221210 natural gas, 221310 water, 221320 wastewater: http://www.sba.gov/size/sizetable2002.html
>
> (2) The small business size standard for electric is 4 Million megawatt hours, natural gas is 500 employees, and for water and wastewater is $6.0 Million.

5. Appellant, a current 8(a) BD program participant, is a wholly-owned subsidiary of

Tikigaq Corporation, an Alaska Native Corporation. Appellant was incorporated in 2002. Appellant is also a participant in the SBA's Mentor/Protégé Program with WS, a large concern, serving as Appellant's mentor (the mentor-protégé agreement was approved by the SBA on September 2, 2005).

6. On August 29, 2005, ANC (the joint venture between Appellant and WS) submitted a proposal for the RFP. The joint venture submitted a written self-certification that it was small.

7. On October 10, 2005, ANC requested SBA approve the joint venture between Appellant and WS. As part of the joint venture application, Appellant submitted its SBA Form 355, which indicated that 71.3% of its sales or receipts were attributable to commercial and industrial building construction under NAICS code 236220, 24.1% of its receipts were attributable to plumbing, heating, and air conditioning under NAICS code 238220, and the remaining 4.6% of its receipts were attributable to industrial building construction under NAICS code 236210.

8. On November 11, 2005, Appellant's General Manager submitted a letter (in response to SBA's e-mail requesting clarification about Appellant) addressing the amount of mega-watt hours of electricity produced by Appellant and its affiliates. Appellant states that "I (the undersigned) certify that [Appellant] nor its affiliates did not generate, transmit, nor distribute electric energy for sale nor have electric output exceeding 4 million megawatt hours. [Appellant] and its affiliates did not produce or sell any electric commodity over the preceding 12 month [sic] of operation."

9. On November 16, 2005, SBA's Alaska District Office (DO) approved the joint venture for NAICS codes 221122, Electric Power Distribution, 221210, Natural Gas Distribution, 221310, Water Supply & Irrigation Systems, 221320, Sewage Treatment Facilities, and 221112, Fossil Fuel Electric Power Generation, for the express purpose of submitting an offer under the RFP (SBA Letter of November 16, 2005).

10. Nearly a year later, the DO realized it may have erred in approving the joint venture. SBA Response, at 2. Specifically, the DO realized it had not considered the requirement in Footnote 1 of 13 C.F.R. § 121.201 (Footnote 1) that required firms to be "primarily engaged in the generation, transmission, and/or distribution of electric energy for sale" along with the 4 million megawatt limitation. Accordingly, on September 14, 2006, the DO sent an e-mail to Appellant stating that there was a misunderstanding on the requirements for Footnote 1. Appeal Petition, Ex. G.

11. On October 2, 2006, the DO informed the joint venture that it had completed a programmatic review of the eligibility of Appellant and WS to submit an offer under the RFP. The Area Office explained that in accordance with 13 C.F.R. § 124.513(b)(3), "a joint venture between a Protégé 8(a) firm and its approved Mentor will be deemed small provided that the Protégé is small under the size standard for the [NAICS] code assigned to the procurement." The DO concluded that Appellant had not demonstrated that it met the definition of a small business concern under NAICS codes 221112 and 221122 because Appellant was not primarily engaged in the generation of electricity pursuant to 13 C.F.R. § 121.201, Footnote 1.

Accordingly, the DO found the joint venture ineligible under NAICS codes 221112 and 221122, but eligible under NAICS codes 221210, 221310, and 221320. The DO invited the joint venture to respond.

12. On October 5, 2006, counsel for the joint venture responded and contested SBA's right to rescind its approval of the joint venture once granted as it would be "patently unfair and would cause direct economic damage to joint ventures…." Further, the DO did not provide any facts to support its finding that Appellant was not primarily engaged in the generation of electricity. Appellant argued that 13 C.F.R. § 121.201, Footnote 1, was not intended to be a minimum qualification nor "a substantive change on the size standards." Counsel also argued that the SBA's ruling would bar Appellant from entering the federal electric utility marketplace despite its "substantial experience related to power plants."

13. On October 6, 2006, the DO responded to Appellant's October 5, 2006 letter. The DO explained that it had based its findings of non-eligibility on "information provided by [Appellant] that it has not been nor currently engaged in either electric power generation or electric power distribution." The DO then explained it was referring the matter to Area Office VI for a formal size determination with respect to the joint venture's small business size status for the NAICS codes assigned to the RFP.

14. The DO referred the question of the size of the joint venture to Area Office VI in an October 11, 2006 letter.

15. On November 22, 2006, the Area Office issued Size Determination No. 06-2007-008 (the size determination) finding Appellant and the joint venture to be other than small under NAICS codes 221112 and 221122. Appellant received the size determination on November 27, 2006, and filed its appeal on December 12, 2006.

16. On December 14, 2006, DESC removed the RFP from the 8(a) program. On January 16, 2007, Appellant filed a Motion to Stay Proceedings for 30 days because of the removal of the RFP from the 8(a) program and its need to assess whether it intended to pursue other 8(a) opportunities that would be impacted by the size determination. On January 17, 2007, I granted the Stay and held the proceedings in abeyance until February 16, 2007. On February 21, 2007, counsel for Appellant orally represented that Appellant wished to proceed with its Appeal.

The Size Determination

The Area Office issued the size determination on November 22, 2006. The Area Office determined Appellant, and consequently the joint venture, were other than small under the size standard for NAICS codes 221112 and 221122 because Appellant was not primarily engaged in the generation, transmission, and/or distribution of electric energy for sale. 13 C.F.R. § 121.201, Footnote 1. The Area Office based its determination on information contained in ANC's October 5, 2006 letter, concluding that "while [Appellant] has some experience closely related to electric energy generation, transmission and distribution, [Appellant] is not primarily engaged in the generation, transmission and/or distribution of electric energy." Size Determination, at 3.

Further, in a memorandum to the SBA dated September 23, 2005, Appellant stated that its primary industry is as "an engineering services firm offering design/build construction, construction, project management, and construction management to our clients."

The Appeal Petition

Appellant filed its Appeal Petition on December 12, 2006. Appellant argues that it was erroneously found other than small under NAICS codes 221112 (Fossil Fuel Electric Power Generation) and 221122 (Electric Power Distribution) (utility codes) because the "primarily engaged" requirement in Footnote 1 should not have been applied.

Appellant argues the Area Office's size determination is based on clear errors of fact and law and must be reversed because:

(1) The regulations and regulatory history of the NAICS code system make clear that the district office's initial size determination was correct and there is no minimum performance requirement associated with the utility codes;

(2) The Area Office's interpretation of the "primarily engaged" requirement in Footnote 1 is "based on a limited examination of [Appellant's] performance history and not any objective measure of size, and therefore is in conflict with the Small Business Act…." Appeal Petition, at 3;

(3) The Area Office failed to articulate a definition of when a company is "primarily engaged" in the electric energy industry; and

(4) The Area Office's size determination was untimely "because it was not issued within 30 days of [Appellant's] November 2005 request for a size determination, as required by 13 C.F.R. 121.603, and it represents an unauthorized rescission of a previously approved joint venture." Appeal Petition, at 4.

1. SBA's Interpretation of 13 C.F.R. § 121.201 is not Supported by the Regulations

Appellant asserts that the size standards for the utility codes are ambiguous, for "SBA itself cannot agree on which interpretation of the size standards is appropriate." Appeal Petition, at 9. Appellant then looks to regulatory history to clarify the regulation. Appellant states that prior to October 2000, size standards were defined by Standard Industrial Classification (SIC) codes and the analogous SIC codes did not contain an accompanying footnote. When SBA translated the SIC codes into NAICS codes, Appellant avers that SBA's "explicitly stated intent was not to change materially any of the existing size standards." Appeal Petition, at 9 (citing 65 Fed. Reg. 30836, 30838 (May 15, 2000)). Appellant argues that there was no notice in the rulemaking process that SBA intended the addition of the footnote to have a substantive change on the size standards. Therefore, Appellant contends that the Area Office's decision to apply the footnote was "contrary to the intent, scope and purpose set forth in the official rule-making documents…." Appeal Petition, at 9 - 10.

2. The Area Office's Interpretation of Footnote 1 Violates the Small Business Act

Appellant argues that the size determination "improperly applies minimum performance criteria that are substantive and that are not related to a firm's size", in violation of the Small Business Act. Appeal Petition, at 10. Specifically, the "primarily engaged" requirement of Footnote 1 is not an appropriate factor to use when defining whether a concern is small. This standard would disqualify smaller businesses and therefore "cannot be considered 'appropriate,' since such a standard would violate the very purpose stated in the Act, namely to 'aid, counsel, assist, and protect…the interests of small business concerns.' 15 USC 631(a)." *Id.*

3. SBA Denied Appellant Due Process

Appellant asserts that SBA failed to articulate a legal basis for its programmatic review and failed to define what it means to be primarily engaged in the electric energy field. Appellant thus did not have notice as to what factors SBA would consider when evaluating their size and did not have an opportunity to provide facts related to that standard, denying Appellant due process.

4. The SBA Utilized Incorrect Information in Making its Size Determination

Appellant argues that the Area Office incorrectly relied on Appellant's October 24, 2005 Form 355 to make its size determination, instead of requesting a new Form 355 from Appellant. Appellant asserts that the Area Office should have elicited facts from Appellant about whether it was primarily engaged in the electric energy field, instead of relying on their 2005 Form 355.

5. The Size Determination is Untimely and Inapplicable to the Instant Procurement

Appellant asserts that pursuant to 13 C.F.R. § 121.603(c), the district office's size determination is binding on the SBA for the remainder of the procurement and cannot be overturned by a subsequent size determination based on the same facts and law available at the time of the district office's size determination. Further, Appellant argues that the Area Office's size determination is untimely and cannot apply to the instant procurement because it was rendered more than 30 days after the request for a size determination. *See* 13 C.F.R. § 121.603(b).

6. SBA Cannot Retroactively Revoke its Joint Venture Approval

Appellant's final argument is that the only time the SBA is allowed to revoke approval of a joint venture for a specific procurement is when the joint venture agreement has been amended or modified. *See* 13 C.F.R. § 124.513. Since Appellant's joint venture agreement has not been modified, the Area Office's size determination can only apply to future procurements.

SBA's Response to the Appeal Petition

SBA's Office of General Counsel filed a comprehensive response to the Appeal Petition. SBA begins its analysis by arguing that 13 C.F.R. § 121.201, Footnote 1, was promulgated pursuant to notice and comment rulemaking and therefore provided sufficient notice of the terms of the proposed rule as required by the Administrative Procedure Act, 5 U.S.C. § 553(b)(3). *See* 64 Fed. Reg. 57188 (Oct. 22, 1999) (proposed rule); 65 Fed. Reg. 30836, 30840 (May 15, 2000) (final rule).

SBA then addresses Appellant's argument that the size determination improperly applies minimum performance criteria that are substantive and not related to a concern's size. SBA asserts that SBA's interpretation of 13 C.F.R. § 121.201, Footnote 1, is in accordance with the Small Business Act and its implementing regulations. SBA argues that 15 U.S.C. § 632(a)(1), (a)(2), and (a)(2)(B) permit SBA's Administrator to define a small business concern by using various detailed definitions and standards. SBA argues definitions and standards can include the number of employees, information pertaining to income or net worth or "a combination of these factors or even other factors, and must vary from industry to industry." SBA Response, at 6. This statute means SBA's Administrator has broad discretion to establish standards to determine whether a concern is a small business and while the statute appears to favor employee-based standards for manufacturing concerns and receipt-based standards for service concerns, it does allow the Administrator to establish standards based upon "other appropriate factors." *See* 15 U.S.C. § 632(a)(2)(B).

SBA next argues the legislative history of the Small Business Act supports its position. It quotes language that explains that Congress will not include detailed definitions of what constitutes a small business because of the variation between business groups. Thus, the applicable legislative history states the Administrator is authorized to determine which concerns are to be designated small within an industry. *See* H.R. Rep. No. 494, 83d Cong., 1st Sess. 3 (1953).

SBA avers the SBA may thus promulgate size standards, such as Footnote 1 to 13 C.F.R. § 121.201, because the contents therein are "appropriate factors." This is permitted by the plain language of 15 U.S.C. § 632 and its legislative history. According to 13 C.F.R. § 121.201, SBA size standards apply to all SBA programs, unless otherwise specified, and the size standards are expressed in either number of employees or annual receipts, unless otherwise specified. These standards indicate the criteria under which a concern and its affiliates will be considered small.

SBA argues the size standards for NAICS codes 221112 and 221122 were promulgated in accordance with the law. The standard for these NAICS codes states a firm will be considered small if:

> including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.

13 C.F.R. § 121.201 n.1. SBA alleges the meaning of this language is clear and thus businesses must be "primarily engaged" in the listed activities to be considered small.

SBA also challenges Appellant's assertion that it is relevant that SBA does not define "primarily engaged." SBA asserts that 13 C.F.R. § 121.107 provides a definition for "primary industry" and that definition may be used. Further, since Appellant stated that neither it nor its affiliates produced or sold any electric energy, "[c]ommon sense dictates that a business is not primarily engaged in any activity if it does not perform that activity at all." SBA Response, at 11 (emphasis in original).

SBA asserts that it utilized the correct information in making its size determination. SBA finds Appellant's argument that it should have been permitted to file a new Form 355 (instead of SBA relying on the October 24, 2005 Form 355) "troublesome, because [Appellant] appears to be arguing that it would have changed its Form 355, depending on the SBA's interpretation of the regulations, despite the fact that [Appellant] certified that it provided all required information to the SBA and that all the information contained in the form and attachments is true and correct." SBA Response, at 11. Further, SBA determines size as of the date of the proposal submission (August 29, 2005) and the 8(a) joint venture must comply with the joint venture regulations as of that date. SBA Response, at 12 (citing 13 C.F.R. § 121.404(a); *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4799 (2006)). Therefore, SBA asserts that it properly relied on: (1) Appellant's October 24, 2005 Form 355 (filed a few months after offer submission) stating that its primary business activity was engineering services; and (2) a memorandum dated September 23, 2005, wherein Appellant stated that its primary industry is an "engineering services firm offering design/build construction, construction, project management and construction management to our clients."

SBA maintains that the basis for its programmatic review is set forth in the regulations. Specifically, SBA must approve a joint venture agreement with one or more small business concerns for the purpose of performing a specific 8(a) contract (13 C.F.R. § 124.513) prior to contract award (13 C.F.R. § 124.513(e)). Further, SBA is permitted to inspect the records of the joint venture at any time and without notice. 13 C.F.R. § 124.513(h). Thus, SBA argues that the regulations permit SBA to approve a joint venture agreement up until contract award. In addition, the district office's error in its application of Footnote 1 and approval of the joint venture agreement cannot estop the SBA from applying the correct interpretation when making its size determination. SBA Response, at 13 (citing *Size Appeal of L. Freedman & Associates, P.C.*, SBA No. SIZ-4247 (1997)). If the SBA were bound by its error, an other than small business could receive an award that was set-aside for small businesses, in contravention of the Small Business Act and its implementing regulations.

Discussion

I. Introduction

As presented by the SBA, Appellant's arguments lack merit. In general, I adopt SBA's arguments, unless otherwise noted.

II. Applicable Law

A. Timeliness

Appeals must be filed within 15 days of receipt of a size determination. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

Upon appeal, OHA must review whether the Area Office made a clear error of fact or law when it determined Appellant to be other than a small business because it did not meet the requirements of 13 C.F.R. § 121.201, Footnote 1. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size or the facts *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. *See Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2006). Thus, I will only disturb an area office's size determination if I determine the area office clearly made key findings of law or fact that are mistaken.

C. The Applicable Size Standard

1. The Basis of 13 C.F.R. § 121.201, Footnote 1[1]

In its response, SBA offers that 15 U.S.C. § 632(a)(1) and (a)(2)(B) authorize SBA's Administrator to promulgate size standards that go beyond revenue and employee counts. Accordingly, SBA states this statutory language is the basis for the provision in 13 C.F.R. § 121.201 that requires a concern to be "primarily engaged" in the generation, transmission, and/or distribution of electrical energy for sale. SBA's argument is based on its reasoning that Appellant is challenging the validity or scope of the "primarily engaged" requirement in its Appeal Petition. I agree with SBA, for this is precisely what Appellant has done.

OHA is not the appropriate forum to challenge the validity of SBA's size regulations. *Size Appeal of Mathews Construction Company*, SBA No. SIZ-3592, at 10 (1992). Rather, OHA's jurisdiction upon the filing of a size appeal is to review the record and evaluate the area office's application of the regulations and law to the facts (13 C.F.R. § 134.314). Further, SBA is entitled to deference in its promulgation of regulations pursuant to statutes under its purview. Properly promulgated regulations are entitled to deference from judicial bodies. The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of regulations. These regulations are given controlling weight if they represent a permissible construction of the statute, and are not arbitrary, capricious or manifestly contrary to the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984). I note that Appellant has made no allegations of arbitrary and capricious behavior by the SBA in the promulgation of 13 C.F.R. § 121.201, Footnote 1.

[1] *See Size Appeal of Doyon Properties, Inc.*, SBA No. SIZ-4838 (2007).

Nonetheless, I will discuss why 13 C.F.R. § 121.201, Footnote 1, is fully consistent with the controlling statute.

The portions of the Small Business Act relevant to the promulgation of size standards for determining when a concern is small (15 U.S.C. § 632) are as follows:

> § 632. Small-business concern
>
> a) Criteria
>
> (2) Establishment of size standards.—
> (A) In general**.—** In addition to the criteria specified in paragraph (1), the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes of this chapter or any other Act.
> **(**B) Additional criteria**.—** The standards described in paragraph (1) may utilize number of employees, dollar volume of business, net worth, net income, a combination thereof, or *other appropriate factors*.
> (C) Requirements**.—** Unless specifically authorized by statute, no Federal department or agency may prescribe a size standard for categorizing a business concern as a small business concern, unless such proposed size standard—
> (i) is proposed after an opportunity for public notice and comment;
> (ii) provides for determining—
> (I**)** the size of a manufacturing concern as measured by the manufacturing concern's average employment based upon employment during each of the manufacturing concern's pay periods for the preceding 12 months;
> (II) the size of a business concern providing services on the basis of the annual average gross receipts of the business concern over a period of not less than 3 years;
> (III) the size of other business concerns on the basis of data over a period of not less than 3 years; or
> (IV) *other appropriate factors*; and
> (iii) is approved by the Administrator.
> (3) When establishing or approving any size standard pursuant to paragraph (2), the Administrator shall ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries and *consider other factors deemed to be relevant by the Administrator*.

(emphasis added).

This language establishes that Congress granted SBA's Administrator broad discretion to promulgate size standards based upon "number of employees, dollar volume of business, net worth, net income, a combination thereof, or *other appropriate factors."* 15 U.S.C. § 632(a)(2)(B) (emphasis added). Moreover, Congress reiterated the broad discretion it granted

SBA's Administrator when it required the Administrator to "ensure that the size standard varies from industry to industry to the extent necessary to reflect differing characteristics of the various industries and *consider other factors deemed to be relevant by the Administrator*." 15 U.S.C. § 632(a)(3) (emphasis added). The use of the primarily engaged and megawatt hours requirements in Footnote 1 to establish size standards for electric power generation and distribution constitute "appropriate factors" and "other factors deemed to be relevant by the Administrator" and are thus authorized as being within the broad discretion granted SBA's Administrator in 15 U.S.C. § 632(a).

2. The Meaning of "Primarily Engaged"

Footnote 1 states:

> NAICS codes 221111, 221112, 221113, 221119, 221121, and 221122--A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.

13 C.F.R. § 121.201 n.1.

SBA's contention, that OHA should look to the definition of "primary industry" in 13 C.F.R. § 121.107 to help define the meaning of the term "primarily engaged," is attractive. It is also consistent with the maxim that when a term or word is not defined, courts will look to standard dictionary definitions and other pertinent regulations. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 477 (1992); *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223 (1992). However, SBA's suggestion is ultimately unavailing, for 13 C.F.R. § 121.107 does not define "primarily engaged." Rather, it lists factors the SBA may consider in determining a concern's "primary industry." Thus, I hold that while 13 C.F.R. § 121.107 is illustrative of factors SBA should consider when determining whether a concern is "primarily engaged" under Footnote 1 of 13 C.F.R. § 121.201, it does not include a usable definition.

When a term is not defined in a regulation, it is up to OHA to derive a meaning by looking to the common everyday meaning of the term or words. The dictionary defines "primarily" as "first of all" or "in the first place" and "engaged" as "occupied, employed." *Webster's Third New Int'l Dictionary, Unabridged*, 1800; 751 (3d ed. 1993). From these definitions, the plain meaning of "primarily engaged" in the context of Footnote 1 is that a concern's main purpose as a business entity, or first occupation, must be to generate, transmit, and/or distribute electrical energy for sale.

D. Estoppel

OHA will not consider an argument of equitable estoppel against SBA absent an allegation of affirmative misconduct. *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4799 (2006) (citing *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000);

Rumsfeld v. United Technologies Corp., 315 F.3d 1361, 1377 (Fed. Cir. 2003)). Moreover, I hold that the existence of affirmative misconduct necessarily requires the Government to have acted in bad faith.

OHA has held:

> [P]arties must recognize that OHA presumes all SBA employees act in good faith in the performance of their duties. I hold the presumption that SBA acted in good faith in issuing a size determination can only be overcome by clear and convincing evidence of personal animus, prejudice, or other irregular conduct. The reason I hold the clear and convincing evidence standard is applicable in this instance is because the Court of Appeals for the Federal Circuit held the clear and convincing standard 'most appropriately describes the burden of proof applicable to the presumption of the government's good faith.' *Am-Pro Protective Agency, Inc. v. U.S.*, 281 F.3d 1234, 1239 (Fed. Cir. 2002). This burden of proof is appropriate, for Appellant is essentially accusing the Area Office of acting in bad faith in issuing the size determination.

Size Appeal of Faison Office Products, LLC, SBA No. SIZ-4834, at 13 (2007). Therefore, I hold that invoking estoppel against SBA requires proof by clear and convincing evidence of affirmative misconduct involving actions related to size determinations and joint venture approvals.

III. Analysis

A. Timeliness

Appellant appealed the size determination within 15 days of receiving it. Therefore, Appellant's appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. The Size Standard

1. Basis of 13 C.F.R. § 121.201, Footnote 1

The size standard contained in Footnote 1 of 13 C.F.R. § 121.201 identifies factors beyond income or employee count, *i.e.*, "primarily engaged" in electric power generation and the number of megawatt hours generated. Footnote 1 is a published regulation subject to public comment. Moreover, Footnote 1 is uniquely directed at NAICS codes that do not require the manufacturing or the provision of services. Rather the codes involve the provision of electricity. Accordingly, I hold, consistent with what I have found above, that the use of the "primarily engaged" and megawatt hours requirements in Footnote 1 constitute "appropriate factors" and "other factors deemed to be relevant by the Administrator" and are thus authorized as being within the broad discretion granted SBA's Administrator in 15 U.S.C. § 632(a).

2. Application of 13 C.F.R. § 121.201, Footnote 1, to Appellant

Appellant admits (Fact 8) and the facts show that it has never been engaged in the generation, transmission, and/or distribution of electric energy for sale. Rather, the facts show Appellant is primarily a construction company that does some plumbing, heating, and air conditioning business (Fact 7). Thus, Appellant's principal endeavor as a business concern has nothing to do with the subject matter of NAICS codes 221112, Fossil Fuel Electric Power Generation, or NAICS code 221122, Electric Power Distribution. Therefore, I hold, as a matter of law, that it cannot be said that Appellant is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale. Under this principle, the Area Office did not make a clear error of fact or law in finding that Appellant is other than small under those NAICS codes.

C. SBA Properly Corrected the Erroneous Size Determination

1. SBA Utilized the Correct Information

Offers were due on August 29, 2005 and Appellant certified its size as of that date (Facts 3 and 6). Pursuant to 13 C.F.R. § 121.404(a), SBA must determine Appellant's size for the procurement as of August 29, 2005.

After submitting its offer under the RFP, Appellant submitted an SBA Form 355 when it requested the SBA approve its joint venture with WS in October of 2005 (Fact 7). In its SBA Form 355, Appellant represented that 71.3% of its receipts were attributable to commercial and industrial building construction, 24.1% of its receipts were attributable to plumbing, heating, and air conditioning, and the remaining 4.6% of its receipts were attributable to industrial construction under a different NAICS code (Fact 7). Hence, Appellant's SBA Form 355 conclusively established that as of the date of its offer under the RFP, Appellant was not primarily engaged in energy generation or transmission.

Appellant's SBA Form 355 representations were made shortly after its offer (within two months). Thus, the representations were contemporaneous with Appellant's self-certification as small and thus relevant. In addition, SBA had no reason to request new information because it is entitled to presume Appellant's SBA Form 355 representations were accurate and complete, for Appellant certified them under the threat of criminal sanctions.[2]

As SBA cogently suggests, Appellant's entire argument is troubling, for it necessarily suggests Appellant would have changed its representations if it knew how SBA would ultimately interpret 13 C.F.R. § 121.201, Footnote 1. Regardless, Appellant's SBA Form 355 representations and Appellant's statement that it did not generate, transmit, or distribute any electric energy (Fact 8) make it clear that Appellant was not engaged in energy generation or transmission as of August 29, 2005.

[2] *See* 15 U.S.C. § 645(d).

2. SBA Must Correct Erroneous Size Determinations When Reviewing a Joint Venture Agreement

SBA is obligated to follow its own regulations. If a district or area office makes a mistake in applying a regulation, it cannot be bound by that act because it had no authority to act contrary to the regulation in the first place.

OHA has previously ruled that area offices are obligated to review approvals of joint venture agreements allegedly compliant with 13 C.F.R. § 124.513 when making a size determination. *Size Appeal of Lance Bailey & Associates, Inc.* SBA No. SIZ-4788 (2006) at 9-11; *Size Appeal of Lance Bailey & Associates, Inc.* SBA No. SIZ-4799 (2006). These recent decisions are fully consistent with SBA's argument that SBA is not bound by its error because otherwise an other than small concern could receive an award set-aside for small businesses, in contravention of the Small Business Act and its implementing regulations.

This means SBA area offices may review joint venture agreements (including size assessments) approved by district offices to ensure compliance with applicable rules and regulations, for only the area office has the authority to make a formal size determination.[3] Consequently, there is nothing improper about SBA's decision to reject or reverse the decision of the DO concerning Appellant's size.

3. SBA is Not Estopped From Correcting Erroneous Size Determinations

In its Appeal Petition, Appellant has made no allegation that the Government committed an act of affirmative misconduct or acted in bad faith in the performance of its duties. Nor is there any proof in the Record that either the DO or the Area Office committed an act of affirmative misconduct or acted in bad faith in any of the actions underlying this appeal. Instead, the Record shows that SBA corrected a mistake by determining Appellant was not a small concern under Footnote 1 of 13 C.F.R. § 121.201 (Facts 10 - 15).

Appellant's failure to allege affirmative misconduct or bad faith is fatal to its request for estoppel relief. Notwithstanding, even if Appellant had made such an allegation, I hold that since the Record is devoid of proof of either misconduct or bad faith, Appellant's request for estoppel relief would fail.

4. 13 C.F.R. § 121.603 is Inapplicable

The relevant text of 13 C.F.R. § 121.603(c) states:

> *Changes in size between date of self-certification and date of award.* (1) Where SBA verifies that the selected Participant is small for a particular procurement, subsequent changes in size up to the date of award, except those due to merger

[3] *See* 13 C.F.R. § 121.1002.

> with or acquisition by another business concern, will not affect the firm's size status for that procurement.

The Area Office did not state that Appellant's status as a small business concern changed between August 29, 2005 and award of any contract, for that would be impossible. In the first instance, no award was made under the RFP because the set-aside for 8(a) concerns was cancelled. In the second instance, the Area Office simply found that Appellant was not small under NAICS codes 221112 and 221122 when it self-certified its size because Appellant was not primarily engaged in activities represented by those NAICS codes. Thus, Appellant's argument on this point has no relevance.

D. Summary

The facts in the Record before me are not in dispute. Rather, Appellant: (1) Disputed the SBA's interpretation and its authority to promulgate 13 C.F.R. § 121.201, Footnote 1; (2) Asserted SBA denied Appellant due process; and (3) Made allegations concerning the Area Office's right to correct the district office's size assessment that involve: (a) SBA relying on incorrect information; (b) 13 C.F.R. § 124.513; (c) estoppel; and (d) 13 C.F.R. § 121.603.

Consistent with SBA's cogent Response, I find no merit in any of Appellant's points. Rather, I find Appellant's request that I reverse the size determination would require me to: (1) Ignore statutory authority granted SBA's Administrator to establish appropriate factors in promulgating size standards; (2) Ignore Appellant's admission that it is not engaged in the generation or transmission of electric energy or give no meaning to 13 C.F.R. § 121.201, Footnote 1; and (3) Overlook that estoppel is not generally available against the Government. Accordingly, I cannot find any clear error of fact or law in the size determination.

Conclusion

I have considered Appellant's Petition and the Record. The Record shows that Appellant is not primarily engaged in the generation, transmission, and/or distribution of electric energy for sale. Therefore, the Area Office did not base its size determination upon a clear error of fact or law when it determined Appellant is other than a small concern under NAICS codes 221112 and 221122. Therefore, the appeal is DENIED and the size determination is AFFIRMED.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

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THOMAS B. PENDER
Administrative Judge